

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 474 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA and
MR.JUSTICE R.R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgement?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

Appearance:

MR KJ SHETHNA with MR ADIL MEHTA for appellants
Ms BR GAJJAR for respondent.

CORAM : M/S.JUSTICES M.R.CALLA & R.R.TRIPATHI, JJ.

Date of decision: 08/12/1999

CAV JUDGEMENT (per M.R.Callla, J.)

This Criminal Appeal is directed against the judgment and order of conviction and sentence passed against the present appellants by the Addl.Sessions Judge and the Designated Judge, Junagadh in Criminal Case No.42 of 1989 dated 19th May 1990, whereby the appellants have been convicted for the offences punishable under Sections 143, 147, 148 and 302 read with Section 149 of the Indian Penal Code and each one of them was sentenced to life imprisonment for the offence punishable under Section 302

read with Section 149 of the Indian Penal Code, and no separate sentence has been awarded for other offences.

2. With regard to an incident dated 18th March 1989 which took place at 3.00 p.m., an FIR was lodged on the same day at 6.45 p.m. at the police station Bhesan. This FIR is Exh.39 at page no.173 of the paper book. The complaint was filed by one Sarbai Sindhi, wife of Valimohmedali, resident of Vishal, Hadmatiya, alleging that in the morning of 18th March 1989 at about 10.00 a.m., she along with her husband Valimohmedali, her brother-in-law Habibali, wife of her brother-in-law (Devar) - Khatuben and her own son Haji had gone to the wadi of Shamji Padma Patel and worked there until afternoon. At that time, her daughter Hajra and Habib's daughter Rashida aged 9 years came with the meals and went back to home. Having taken the meals, they again started agricultural work and at 3.00 p.m., her husband and her brother-in-law left to bring water pump machine from the wadi of Harijan Alabhai so as to install in their own wadi. Thereafter, her son Haji went to the wadi of Torniana Patel by the side of their own wadi to bring the bullock cart and went towards the river with the bullock cart. Thereafter she and wife of her brother-in-law Khatuben left towards river for lining. While they were a little away from the river, she heard the sound of fire, but when she reached the spot where the water pump machine was placed, she found Tarmohmed Jusab, Sulaiman Jusab, Noormohmed Jusab and Hasan Jusab with guns and Hamad Jusab, Issac Osman, Abu Hasan, Tarmohmed Ibu and Tarmohmed Ismail were there with Bhala (spear) and Kuhadi (axe). These persons were beating her husband and brother-in-law with Bhala (spear) and Kuhadi (axe) and her husband and her brother-in-law had fallen down. The four persons as above who were having guns were standing there and telling, "finish them". Having seen as above, she and wife of her brother-in-law started crying and all the ten persons named as above boarded the Tractor and went towards the village. She, wife of her brother-in-law and her son found that her husband Valimohmed aged about 60 years and her brother-in-law aged about 30 years had died. Their bodies were blooded all over and thereafter she along with her son Haji went to Medpara to Sindhi Jusabbhai and therefrom they had come to the police station with Jusabbhai on motorcycle. It is also given out by her in the complaint that about five years back, her brother-in-law Habibali had killed one Ahmad Osman, i.e. Buva's son of Tarmohmed Jusab and in that case, her brother-in-law had been sentenced to life imprisonment and her brother-in-law Habibali had come on parole about 15 days back to the village Vishal

Hadmatiya and it is for this reason that the abovenamed ten persons had jointly killed her husband and her brother-in-law with gun fire, Kuhadi (axe) and Bhala (spear). Out of the four persons having guns, Sulaiman Jusab had a licenced gun and whether the rest of the three had licence or not is not known to her. On the basis of this complaint, Criminal Case No.14 of 1989 was registered in the crime register. The case was registered against the aforesaid ten persons under Sections 302, 143, 147, 148, 149 of the Indian Penal Code, Section 5 of the TADA Act, Section 25(C) of the Arms Act and Section 135 of the Bombay Police Act. After the investigation, the police filed the chargesheet against the aforesaid ten persons, i.e. present ten appellants in Criminal Case No.42 of 1989 before the Designated Court at Junagadh. It appears from page 15 of the paper book that on 18th January 1990, the Addl.Sessions Judge, Junagadh had passed an order that the Government had withdrawn the charge against the accused persons under Section 5 of the TADA Act of 1987 and since the charge was withdrawn before framing the charge, the accused were discharged from the charge under TADA Act. The charges were framed against the present ten appellants on 18th January 1990 for the offences under Sections 302, 143, 147, 148, 149 of the the Indian Penal Code and Section 135 of the Bombay Police Act. The appellants accused persons denied the charge and claimed trial. The trial has resulted into their conviction and sentence as aforesaid vide judgment and order of conviction dated 19th May 1990 passed by the Addl. Sessions Judge and Designated Judge, Junagadh, which is under challenge in this appeal.

3. In the trial, the prosecution examined PW3 Sarbai Exh.38 (wife of deceased Valinohmed) at page 159 of the paper book, PW4 - Khatija Exh.42 (wife of deceased Habibali) at page 178, PW5 Hajibhai Valimohmed at Exh.43 (son of deceased Valimohmed) at page 183 of the paper book. Out of these three eye witnesses, PW4 and PW5 were declared hostile. By way of medical evidence, PW2 Dr.Vallabhbhai Gopalbhai was examined at Exh.34 at page 149 of the paper book. He has proved the Post Mortem note of deceased Valimohmed Exh.35 at page 153. PW6 Dr.Bhalchandra Joshi has been examined at Exh.44 at page 186 of the paper book to prove the Post Mortem note of deceased Habibali Exh.46 at page 193.

4. The other witnesses include PW1, Circle Inspector Exh.28 at page 144, PW7 Jasubhai Exh.47 at page 119 and the panch witnesses PW7, PW12, PW13, PW15, PW16 and PW17, who were declared hostile.

5. Learned Counsel for the appellants has submitted that PW3 Sarbai cannot be said to be an eye witness at all and is not at all believable. A perusal of the contents of the FIR Exh.39 and her statements before the Court at Exh.38 would show that the same are at great variance and as per the FIR, she had only heard the sound of the fire shots whereas in the statements she has deposed as if she was present on the spot at a distance of 10 to 12 ft. only. As per the FIR, she had only seen her husband and her brother-in-law lying on the ground in bloodied condition which implies that the assault was already over by the time she reached on the spot and yet she has stated that Tarmohmed Jusab had fired shot and Sulaiman Jusab had injured her brother-in-law with the gun and thereafter all the accused persons had attacked her husband and brother-in-law with spear and axe and that while they were being attacked and injured, she and wife of her brother-in-law were crying. According to her, they had taken meals after 12.00 noon, but the medical evidence of PW2 Exh.34 Dr.Vallabhbhai Gopalbhai, PW Exh.36 and Post Mortem note at Exh.35 of Valimohmed, the evidence of PW6 Exh.44 Dr.Bhalchandra Joshi and Exh.45 and Post Mortem Note Exh.46 of Habib does not show presence of any food material. The absence of food articles in the small intestines also negatives the story that they had taken food together at 12.00 noon or 1.00 p.m. It was also submitted that the absence of firearm injuries and that in case both the deceased had been beaten by as many as ten persons with spear and axe, there would have been much more injuries as have been mentioned in Exh.35 and Exh.46. It was also submitted that if Habib was the target, Valimohmed would not have been attacked first and if the appellants also wanted to kill even the son of Valimohmed, he could not escape. According to PW3 Sarbai, Valimohmed was beaten near the hut and Habib was beaten in the river even after they fell down. As per the FIR, her son Haji was throughout there with her and he had also accompanied her when she first went to Medpara as disclosed in FIR but in evidence, she says that she alone to Medpara. She has stated in her evidence before the Court that she walked down to Medpara and met Jusabbhai. As per FIR, she went on motorcycle of somebody else to the police Station, Bhesan from Medpara and Jusab came on other motorcycle. In para 10 of her deposition, she had made a statement contrary to what she has stated in FIR where she has said that while laying pipe of the machine, she had reached upto the way leading to the village Bhat and she has also denied that she had heard the sound of fire shots when she had reached the way to village Bhat. In nutshell, it

has been argued that the whole story is improbable and has been substantially changed from the FIR to the evidence of the complainant.

6. PW4 Khatijaben Exh.42 who is the widow of the deceased Habibbhai and who is said to be present has not supported the case of the prosecution case. On the contrary, she has deposed before the Court that when the water pump machine was placed in the cart, she and Sarbai were near the hut and she does not know what happened thereafter. All that she has said is that a Tractor came near the hut, she does not know who was driving the Tractor, she also does not know who came there and what happened. She also does not know what had happened to her husband and she says that when she reached the spot, Valibhai and her husband were lying dead and Haji had gone to bring tools for the machine. In para 7 of her statement, she has categorically said that she did not see the incident, she also did not see anybody beating nor she saw arms with any one of them. It is at this juncture that this witness was declared hostile.

7. Similarly, PW5 Hajibhai Exh.43 at page 183 has also not supported the prosecution case and on the contrary, has stated that he had gone to take the tools for opening the machine and when he came back, his father and his uncle were lying in bloodied condition and therefore, he went to the wadi and informed his mother, i.e. PW3 and his aunt PW4. He has categorically stated that he did not see the incident and did not see the appellants beating his father and uncle. It is at this juncture that he was declared hostile by the prosecution.

8. PW7 Exh.47 at page 199, i.e. Jusabbhai has deposed that on the date of incident at about 6.00 p.m. Sarbai came to him and told him that she wanted to go to Bhesan to file the complaint. He did not ask her anything as to what had happened and she did not tell him anything else. A person was passing by on a motorcycle and therefore, he made her to go on that motorcycle and he himself followed on another motorcycle. He says that he kept standing outside the police outpost and only Sarbai went to the police station. At this juncture, this witness was also declared hostile.

9. Most of the panch witnesses have also been declared hostile which renders the prosecution story about the recovery of the weapons to be doubtful and according to learned Counsel for the appellants, the police witnesses only disclosed as to how the investigation proceeded in this case.

10. PW2 Dr. Vallabhbhai Gopalbhai Exh.34, at page 149, PW6 Dr.Bhalchandra Joshi Exh.44 at page 186 are the Doctors who had conducted the Post Mortem of deceased Valimohmed and Habib respectively. They have narrated the injuries and have proved the Post Mortem notes Exh.35 at page 153 and Exh.46 at page 193. The FSL report is at Exh.82, page 267 and the Chemical Analyser's report is at Exh.83 at page 275 and Exh.85 is the report of the Senior Scientific Officer of the FSL cum Assistant Chemical Analyser with regard to the Parcel-A, Parcel-B and the result of examination of Exh.A, Exh.B1 and Exh.B2. It has been reported that Exh.A is a double barrel pitch loading shot gun. It was successfully test fired from right barrel of Exh.A and right barrel was found to be in working condition. As the firing pin of left barrel of Exh.A was broken, no test firing could be done from left barrel of Exh.A. That Exh.A had been used for firing prior to its receipt in the laboratory. The effective range of Exh.A is about 50 yards. However, it has been mentioned that, "no opinion can be given regarding the time of firing". Exh.B1 and Exh.B2 are two fire K.F. 12 Bore Shot gun catridge cases. It has been reported that they were test fired from the right barrel of Exh.A and it has been concluded that Exh.B1 and Exh.B2 have been fired from the right barrel of Exh.A.

11. Mr.Shethna has also submitted that there was a delay even in filing the FIR. The FIR is filed on the same day. The incident took place at 3.00 p.m. at village Hadmatiya. The complainant then went to village Medpara which is at a distance of about 6 k.m. wherefrom she got lift to reach the police Station, Bhesan and filed the complaint at 6.45 p.m., i.e. within three hours and 45 minutes. Hence, we do not find it to be a case of unreasonable and unexplained delay.

12. Learned Addl.Public Prosecutor Ms.Gajjar has submitted that the motive on account of the previous enmity is proved in this case. PW3 is the witness who has seen the incident with her own eyes and it cannot be said that she is not an eye witness. Learned Addl. Public Prosecutor has submitted that the appellant Tarmohmed was equipped with firearm and fired at Valimohmed, it cannot be said that the firearm was not used. Mere ground of suspicion in such case when there were ten persons, it cannot be said a ground to disbelieve her. The appellant no.2 was also equipped with firearm and he had also used the firearm to give a blow of the same to deceased Habibali. The appellant no.3 was also equipped with firearm and he threw it and

gave the blow to the deceased's son, namely, Haji, but he had been successful in running away. All the appellants had come prepared and armed with guns, spears and axe and caused injuries on the person of deceased Valimohmed and Habibali and therefore, they all are responsible for the offences in question. She has made a reference to hostile witnesses - PW1, PW4, PW5, PW7 and PW21, and has submitted that even if they have been declared as hostile, they have not disputed the factum of lodging of the complaint by PW3 Sarbai, her say and presence. She has submitted that the variance and discrepancies in her statements are explainable because she is an illiterate lady. She has also made reference to certain panchnamas and the panch witnesses.

13. We have considered the submissions made on behalf of both the sides. So far as the oral evidence is concerned, PW3 is the Star witness of the prosecution who is the author of the complaint and we find that there is marked difference, variation and improvement in the deposition made by her as compared to the FIR. It was her first version that while on the way to the spot, she had heard some sound and she believed that it was the sound of some fire works. This by itself shows that in fact she was not present on the spot where the shots are said to have been fired, and yet, she has deposed as if she herself was present right on the spot at the time when the shots are said to have been fired. However, before the Court, she has stated that it was wrong to suggest that when she reached on the way to village Bhat, she heard the sound of fire works. Her version on the question of going from Medpara to Bhesan Police Station on motorcycle with Jusab has also been contradicted by herself as also PW7 Jusabbhai. She has categorically stated about the presence of PW4 Khatuben and PW5 Hajibhai on the spot at the time when the incident took place, but both the witnesses PW4 who is wife of the other deceased and PW5 her own son have categorically stated that when the machine was loaded in the cart, Khatu herself and PW3 Sarbai were near the hut which is on the side of their farm and thereafter what happened, she does not know and by the time they reached the spot Valimohmed and Habib were lying dead and Haji had gone to bring tools for opening the machine and after that, neither she saw the incident nor she saw anybody beating the deceased persons nor she saw any arms with anybody. Similarly, PW5 Haji who is son of PW3 Sarbai has also stated that his mother Sarbai and his aunt Khatu were lining in the farm, he had gone to bring tool for opening the machine and by the time he came back, his father and uncle were lying in blooded condition and therefore, he

went back to the wadi and informed his mother and his aunt. He further says that he did not see the incident and did not see the accused persons beating his father. Whereas these two witnesses have been declared hostile, one of them being the widow of one of the deceased and the other being the son of the other deceased and both these witnesses PW4 and PW5 themselves have contradicted the presence of PW3 on the spot, the testimony of PW3 is rendered highly vulnerable. When the son of PW3 Sarbai himself says that having seen his father and uncle lying in blooded condition, it is he who went and informed his mother and aunt in the wadi where they were laying down lines, the presence of PW3 Sarbai i.e. mother of this witness PW5 becomes highly suspicious and doubtful. In face of the version given by PW4 and PW5, it is very difficult to accept PW3 Sarbai as a direct eye witness and we do not find it safe to rely upon the detailed narration and account of the incident as has been given out by PW3 in her deposition before the Court which otherwise also is at variance with her own FIR and speaks of many improvements over her first version.

14. So far as the recoveries of the weapons which are said to have been used in the commission of the offence in this case, they also cannot be taken to be sufficient so as to connect the accused persons with the offence as most of the panch witnesses have turned out hostile and merely because in the FSL report Exh.82, it has been reported that blood was found on the samples and that as per the Chemical Analyser's report Exh.83, it was human blood of the groups mentioned against different items therein, at page 275, no criminal liability can be fastened against the present appellants. In Exh.85, it has been reported that no opinion could be given regarding the time of firing and therefore, it cannot be concluded as to prior to test firing done in the laboratory, at what point of time the firearm in question was actually put to use.

15. As per the Post Mortem note of deceased Valimohmed Exh.35 as has been referred to by PW2 Dr.Vallabhbai Gopalbai Exh.34, there were as many as six injuries on the body of deceased Valimohmed including incise wound on the left side of the chest wall, right side of the chest wall, punctures on right side supra stained wound muscle deep margin shape cut blood clot and on oval shape clear medial border of right scapula muscle and incise wound in mid area of interscapular region with blood clot and over Occipitalscapular margin and fracture of 3rd rib left side in wound no.1 and that all the injuries were ante mortem and further that on internal

examination also, injury of fracture was detected in the skull and the cause of death has been given as hamorrhagic shock due to intrathorasic injuries. Similarly, the post mortem note Exh.46 with regard to the deceased Habibali as has been referred to by PW6 Exh.44 shows the injuries of 10 incise wounds, stab wound, 3 abrasions etc. as detailed out in Exh.46 against columns 17, 18, 19 and 20 and all the injuries are ante mortem and the cause of death is given as hemorrhagic shock due to intrathorasic and intra abdominal injuries hemorrhage due to injury to vital organ, heart, liver and lung. Such injuries could be caused by the weapons like spear and axe but that by itself does not bring the guilt home to the accused persons and in absence of any reliable evidence that such injuries were inflicted by the accused persons, they cannot be held liable for causing the injuries particularly when PW3 stands disbelieved. So far the firearms are concerned, there is no injury which can be said to be caused by any firearm and the Post Mortem notes also negative the case of the prosecution that firearms were used and in the expert report also, no opinion has been given regarding the time of firing.

16. The upshot of the aforesaid discussion and analysis of the oral, medical as well as expert evidence and the recoveries is that the prosecution has not come with the correct version and the whole story with which the prosecution has come to the Court is rendered improbable and on the basis of such evidence, we do not find it safe to uphold the conviction. The suspicion however strong cannot take the place of proof. In such cases, we have to travel to the accused from the evidence and not from the accused to the evidence. The prosecution has failed to bring home the guilt to the hilt against the present appellants and in our considered opinion, the appellants are certainly entitled to the benefit of doubt.

17. In the result, this Criminal Appeal is allowed and the conviction of the appellants and the sentence awarded to them by the impugned judgment and order dated 19th May 1990 passed by the Addl. Sessions Judge and designated Judge, Junagadh in Criminal Case No.42 of 1989 is hereby set aside. The appellants, namely, (1) Sindhi Tarmohmed Jusab, (2) Sindhi Suleman Jusab, (3) Sindhi Noormohmed Jusab, (4) Sindhi Husen Jusab, (5) Sindhi Ahmad Jusab, (6) Sindhi Isaq Osman, (7) Sindhi Tarmohmed Osman, (8) Sindhi Alarakha Jusab, (9) Sindhi Hasan Ibhu alias Ibrahim, and (10) Sindhi Tarmohmed Ibhu alias Ibrahim, are hereby acquitted by granting the benefit of

doubt and it is ordered that they may be released forthwith if not required in any other case. Direct service is permitted.

Sreeram.